IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 6, 2004 Session

J. D. LEE, ET AL. v. STATE VOLUNTEER MUTUAL INSURANCE COMPANY, INC., ET AL.

Appeal from the Circuit Court for Knox County
No. 3-343-02 Wheeler A. Rosenbalm, Judge

No. E2002-03127-COA-R3-CV - FILED JANUARY 21, 2005

This appeal involves a dispute among lawyers following the settlement of a medical malpractice case. The two lawyers originally retained to represent the plaintiffs filed suit in the Circuit Court for Knox County against five law firms, seven lawyers, and one insurance company alleging, among other things, that the defendants had tortiously interfered with their contract with their clients. After the trial court granted the defendants' Tenn. R. Civ. P. 12.02(6) motion to dismiss, the plaintiff lawyers filed a "petition to rehear" requesting permission to file a substantially pared down amended complaint against two of the defendant lawyers and law firms. The trial court denied the "petition to rehear" after concluding that the proposed amended complaint also failed to state a claim upon which relief could be granted. The plaintiff lawyers assert on this appeal that the trial court erred by denying their request for a continuance prior to the first hearing on the defendants' Tenn. R. Civ. P. 12.02(6) motions and by denying their "petition to rehear." We affirm both the denial of the continuance and the denial of the "petition to rehear." We also find that this appeal is frivolous in accordance with Tenn. Code Ann. § 27-1-122 (2000).

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Thomas L. Rasnic, Kingsport, Tennessee, for the appellants, J. D. Lee; David C. Lee; and Lee, Lee & Lee.

Amelia G. Crotwell, Knoxville, Tennessee, for the appellees, L. Martin McDonald, individually; and L. Martin McDonald; Farrell A. Levy; and Charles G. Taylor; III d/b/a McDonald, Levy & Taylor.

OPINION

I.

Devin Shoughrue suffered serious brain damage on December 21, 1993, two days after he was born at St. Mary's Medical Center in Knoxville. In November 1994, his parents, Kelvin and

Laura Shoughrue, entered into a contingency fee agreement with J. D. Lee to represent them in a medical malpractice case against the hospital and the attending physicians (collectively, "Devin's healthcare providers").[1] In December 1994, Mr. Lee filed a medical malpractice complaint in the Circuit Court for Knox County on behalf of the Shoughrues, individually and as Devin's natural guardians, for the injuries Devin suffered as a result of the alleged negligent acts and omissions of Devin's healthcare providers.

This complaint was dismissed without prejudice in June 1996. When the complaint was refiled, it sought $2.5 million in damages for the Shoughrues and $22.5 million in damages for Devin. Later, Mr. Lee amended the complaint to add alternative theories of lack of informed consent and medical battery. In September 2000, after the case languished for several years, Mr. Lee offered to settle the case for $12.5 million. Devin's healthcare providers rejected the offer. During mediation conducted in February 2001, Mr. Lee repeated his $12.5 million settlement offer. When Devin's healthcare providers countered with an offer of $350,000, Mr. Lee raised his demand to $22.5 million. The mediation ended shortly thereafter with no settlement.

Ms. Shoughrue died on March 1, 2001. Gerald L. Gulley, Jr. was appointed as the administrator ad litem for her estate, and the estate was substituted as a party to the lawsuit in the place of Ms. Shoughrue. Less than a week after Ms. Shoughrue's death, Jean Baker, Ms. Shoughrue's mother, filed a petition in the Knox County Juvenile Court seeking to be appointed as Devin's temporary custodian. Ms. Baker testified that Mr. Shoughrue had a violent temperament and that she feared for Devin's safety. The juvenile court granted Ms. Baker's petition and awarded her temporary custody of Devin.

On May 11, 2001, Ms. Baker, represented by L. Martin McDonald and the law firm McDonald, Levy & Taylor, filed a petition seeking to intervene in the pending medical malpractice case. Ms. Baker also requested that the trial court appoint a guardian ad litem to protect Devin's interests. The trial court appointed Jennifer Bjornstad, who had previously served as Devin's guardian ad litem in the juvenile court case, as Devin's guardian ad litem in the medical malpractice case. The trial court directed Ms. Bjornstad to investigate the status of the case and the prospects for settlement and to ensure that Devin's interests were being protected. The trial court also appointed Gary Dawson to assist Ms. Bjornstad.

At a May 18, 2001 hearing, Ms. Bjornstad advised the trial court that allowing Ms. Baker to intervene in the medical malpractice case would be in Devin's best interests. The trial court agreed that Ms. Baker should be allowed to participate in the case, though not as a separate plaintiff. The trial court also determined that further mediation should take place before the scheduled trial date of June 25, 2001. The trial court determined that Mr. Lee would take the lead in the negotiations for

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[1]The agreement specifically provided:

> I agree to pay Thirty-Three and One-Third (33-1/3) Percent of the total recovery as a fee whether suit is by compromise, trial and verdict, or trial, verdict and appeal. In the event of an appeal, I agree that the accrued interest on the total judgment in the event it is successful be paid to J. D. Lee.

Mr. Shoughrue, Devin, and Ms. Shoughrue's estate, and that Mr. McDonald and Ms. Bjornstad would be allowed to participate in the mediation of the claims of Devin and Ms. Shoughrue's estate.[2]

The second mediation was held on June 15, 2001. Mr. Lee, Mr. McDonald, Ms. Bjornstad, and Ms. Baker were all present. According to Mr. Lee, Mr. McDonald and Ms. Bjornstad had agreed prior to the mediation not to accept any offer less than $3.5 million to settle Devin's claim. However, as the mediation progressed, Mr. McDonald and Ms. Bjornstad, despite Mr. Lee's objections, made counter-offers to settle Devin's case for less than $3.5 million. Mr. Lee voluntarily left the mediation in frustration without informing Mr. McDonald or Ms. Bjornstad that he was leaving. Because Mr. Lee did not instruct the mediator to halt the mediation, the negotiations continued, and the participants eventually agreed to settle the claims of Devin and Ms. Shoughrue's estate for a substantial sum, though less than $3.5 million. Devin's portion of the settlement was subject to court approval pursuant to Tenn. Code Ann. § 34-1-121(b) (2001).

When Mr. Lee was informed of the proposed settlement, he treated it as an offer and rejected it on behalf of Devin and Ms. Shoughrue's estate. When the trial court conducted a hearing on June 19, 2001 to review the results of the second mediation, Mr. Lee insisted that the settlement was inadequate. After weighing the strength of Devin's malpractice claim and the extent and urgency of his needs, the trial court determined that the proposed settlement was in the best interests of both Devin and Ms. Shoughrue's estate. Accordingly, on July 13, 2001, the trial court entered an order approving the settlement and setting aside one-third of the settlement to cover attorneys' fees.

In May and August of 2002, the trial court held hearings on applications for attorneys' fees filed by Mr. Lee and his firm and by Mr. McDonald and McDonald, Levy & Taylor. On December 18, 2002, the court entered an order awarding Mr. Lee and his law firm $175,000 in attorneys' fees in addition to the $138,768 in attorneys' fees they had previously been awarded. The court awarded Mr. McDonald and McDonald, Levy & Taylor $175,000 in attorneys' fees plus accrued interest for their services in the case. Because the total attorneys' fees awarded amounted to less than one-third of the total settlement, the trial court ordered that the remaining funds set aside to cover attorneys' fees be returned to Devin's estate.

Mr. Lee and his law firm did not appeal the order approving the settlement of the claims of Devin and Ms. Shoughrue's estate. They did, however, appeal the trial court's division of attorneys' fees. In *Shoughrue v. St. Mary's Med. Ctr., Inc.*, No. E2003-00116-COA-R3-CV, 2004 WL 948381 (Tenn. Ct. App. May 4, 2004), *perm. app. denied* (Tenn. Nov. 15, 2004), the Eastern Section of this court rejected Mr. Lee and his law firm's challenge to the trial court's attorneys' fees award. We noted that Tenn. Code Ann. § 29-26-120 (2000) requires the trial court to determine the amount of attorneys' fees to be awarded in contingency fee medical malpractice cases, irrespective of the provisions of an attorney-client contract, and sets the maximum possible attorneys' fees award at one-third of the total damages awarded to the client. We also noted that under Tennessee law, attorneys' fees agreements are not binding on a minor, and although an attorney who confers a benefit on a minor is entitled to receive the reasonable value of his or her services, the value of those

[2]On the day the second mediation was scheduled to begin, the trial court dismissed Mr. Shoughrue's claims with prejudice for reasons unrelated to the issues involved in the current appeal.

services must be determined by the trial court under the circumstances of the case. Thus, we concluded that "regardless of the fact that Mr. and Ms. Shoughrue agreed that Mr. Lee would receive thirty-three and one-third of the total recovery in this case, he is only entitled to that fee which the Trial Court determines to be reasonable." *Shoughrue v. St. Mary's Med. Ctr., Inc.*, 2004 WL 948381, at *5.

We then addressed whether the amount of attorneys' fees awarded to Mr. Lee and his firm for their services in the medical malpractice case was reasonable. We acknowledged the trial court's finding that Mr. Lee and his firm had prepared the case for trial, and that without their work, there would have been no possibility of a settlement for Devin at all. However, we also recognized that the trial court had found serious deficiencies in Mr. Lee's representation of Devin. We concluded that the record on appeal supported the trial court's findings (1) that Mr. Lee's simultaneous representation of both Devin and Mr. Shoughrue presented a conflict of interest; (2) that the litigation funding agreements Mr. Lee entered into on Devin's behalf were not in Devin's best interests; (3) that Mr. Lee did not communicate appropriately with anyone representing Devin's interests for several weeks following Ms. Shoughrue's death; and (4) that Mr. Lee failed to consider Devin's legitimate needs and objectives in prosecuting the case.[3] Finally, we approved the trial court's conclusion that but for the participation of Mr. McDonald and his law firm, the settlement, which the trial court found to be in Devin's best interests, would never have been reached. Accordingly, we held that the trial court did not abuse its discretion in its award of attorneys' fees to Mr. Lee and his firm.

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[3]In connection with this last point, we highlighted the following testimony from Mr. McDonald:

> These people were living in a home that was under foreclosure. The home was a shanty. . . . They had a vehicle that they were moving this child about in that was bungee corded, the doors were. When they got the child's wheelchair in the van, they had to take ropes and tie the wheels steady.
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> They did not have other funding. The furniture in the house was terrible and needed to be taken to the dump. That, along with a life expectancy, the–if you are going to get a verdict and it is supposed to be for this child and the child is already seven, and if you believe Dr. Olsen, he's going to live to 12 to 15, then when is he going to get the money? When is he going to start getting some benefit out of this?

Shoughrue v. St. Mary's Med. Ctr., Inc., 2004 WL 948381, at *10. We also noted the following testimony from Ms. Bjornstad, Devin's guardian ad litem in both the juvenile court case and the medical malpractice case:

> In my opinion after talking with witnesses and Ms. Jean Baker who takes care of–the maternal grandmother who takes care of the child, to have a comfortable home that is roomy enough to have a wheelchair in it and a van that can transport the child . . . are his main needs. Because of his health--he is very fragile, his health is. He can't travel a lot, and there would be no way he could spend huge amounts of money.
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> . . . .
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> Basically the expenses that we were looking at that we wanted to get covered after court costs and attorneys' fees and all of those things, that he had enough money to buy a house and furnish the house and buy a vehicle, because his health care needs were taken care of by TennCare so that wasn't an issue.

Shoughrue v. St. Mary's Med. Ctr., Inc., 2004 WL 948381, at *10.

The course of the second mediation, and the possibility that he would have to share the attorneys' fees from the case with Mr. McDonald or his law firm, had clearly upset Mr. Lee. On June 13, 2002, even before the trial court could have made a final determination regarding the division of attorneys' fees, Mr. Lee, David C. Lee, and their law firm (collectively, the "Lees") filed suit in the Circuit Court for Knox County against five law firms, seven lawyers, and one insurance company that had been involved in the medical malpractice litigation. The Lees asserted that the defendants had unlawfully interfered with their contract to represent the Shoughrues and Devin and that this interference gave rise to causes of action for tortious interference with contract, civil conspiracy, intentional infliction of emotional distress, extortion, unjust enrichment, and violations of 42 U.S.C. § 1983.

As the factual basis for these causes of actions, the Lees alleged that Mr. McDonald illegally interfered with their contract with the Shoughrues by agreeing to represent Ms. Baker and by filing a petition to intervene in the medical malpractice case on her behalf. The Lees also alleged that all of the defendants illegally interfered with their contract with the Shoughrues by agreeing to the proposed settlement at the June 15, 2001 mediation. The Lees sought compensatory damages of $12.5 million, treble damages for statutory interference with their contract, $12.5 million in punitive damages, and attorneys' fees and costs.

The defendants filed Tenn. R. Civ. P. 12.02(6) motions to dismiss the complaint for failure to state a claim upon which relief could be granted and a Tenn. R. Civ. P. 12.03 motion for judgment on the pleadings. The trial court set a hearing on the defendants' motions for August 23, 2002. Two days before the hearing, however, the Lees moved for a continuance. They insisted that the Tenn. R. Civ. P. 12.02(6) motions should be converted to motions for summary judgment because the defendants had submitted evidentiary materials outside the pleadings and that they needed additional time to assemble the materials necessary to oppose the converted motions. The trial court denied the Lees' motion for a continuance and proceeded with the hearing on the defendants' motions as scheduled.

At the conclusion of the hearing, the trial court held that the Lees' complaint should be dismissed for failure to state a claim upon which relief could be granted. The court reasoned that in order to prevail on any of their claims, the Lees would be required to prove that their contract with the Shoughrues was breached as a result of the acts of the defendants. The trial court found that "nowhere in the complaint is there any allegation that the [Shoughrues] cut off [the Lees] or prevented them in any way from continuing representation of their cases," and that "[t]he complaint simply fails to allege that the [Shoughrues] breached their contract with the [Lees]." Several weeks later, on September 12, 2002, the trial court entered a judgment incorporating its oral ruling and dismissing the Lees' complaint for failure to state a claim upon which relief could be granted.

On October 1, 2002, the Lees filed a "petition to rehear" and a proposed amended complaint. They argued that the trial court should reconsider the defendants' motions to dismiss because the court had not given them an opportunity to amend their complaint to state a valid cause of action. The proposed amended complaint was a substantially pared down version of the original complaint. It named as defendants only two of the attorneys and law firms involved in the related malpractice

action,[4] sought only $6 million in compensatory and punitive damages, and contained only three causes of action for tortious interference with the contract and business relations, breach of contract, and unjust enrichment. The proposed complaint provided somewhat greater detail regarding the extent of the Lees' services in the malpractice case but did not contain any substantially new allegations regarding the conduct of either the defendants or the Shoughrues. It also clarified that the damages the Lees were seeking were "the loss of their attorney's fees."

The trial court heard argument on the Lees' "petition to rehear" on December 6, 2002. At the conclusion of the hearing, the trial court stated that the proposed amended complaint suffered from the same defects as the Lees' original complaint. The trial court found that although the proposed amended complaint correctly recited all the legal elements of a cause of action for tortious interference with business relations, it failed to allege the essential facts necessary to support these legal elements. Specifically, the trial court found that the proposed amended complaint failed to allege any facts showing that the Lees were cut off from representing the Shoughrues, or that the Lees had suffered any damages as a result of the defendants' actions.

The trial court also concluded that it could not entertain challenges based on the wisdom or fairness of the original settlement or the division of attorneys' fees in the medical malpractice case because these matters would be addressed in the malpractice case. On December 16, 2002, the trial court entered an order denying the Lees' "petition to rehear" on the ground that allowing the amendment would be futile because the proposed amended complaint, like the Lees' original complaint, failed to state a claim upon which relief could be granted.

On December 18, 2002, the Lees filed a notice of appeal from the trial court's order denying their "petition to rehear." On appeal, the Lees argue that the trial court erred by (1) denying their motion for a continuance of the hearing on the defendants' Tenn. R. Civ. P. 12 motions; (2) holding that the original complaint failed to state a claim for tortious interference with contract by Mr. McDonald and McDonald, Levy & Taylor; and (3) holding that their proposed amended complaint failed to state a claim for tortious interference with business relations. Mr. McDonald and McDonald, Levy & Taylor urge us to affirm the trial court's September 12, 2002 judgment and December 16, 2002 order and further request a judgment against the Lees for attorneys' fees and costs for filing a frivolous appeal.

II.
THE TIMELINESS OF THE LEES' NOTICE OF APPEAL

At the outset, we must first address a jurisdictional issue relating to the timeliness of the Lees' notice of appeal. The filing of a timely notice of appeal is mandatory and jurisdictional in civil cases. *Albert v. Frye*, 145 S.W.3d 526, 528 (Tenn. 2004); *Jefferson v. Pneumo Servs. Corp.*, 699 S.W.2d 181, 184 (Tenn. Ct. App. 1985). Thus, when the record presents a substantial question

[4]Several of the defendants named in the original complaint agreed either not to file or to dismiss pending motions for sanctions against the Lees and their counsel in return for the Lees' agreement that the judgment dismissing the complaint would become final, irrevocable, and non-appealable as to these defendants. This agreement is reflected in an agreed order entered by the trial court on October 2, 2002.

regarding the timeliness of a notice of appeal, we must address the question even if it has not been raised by the parties. Tenn. R. App. P. 13(b).

Even though the judgment dismissing the Lees' complaint was filed on September 12, 2002, the Lees did not file their notice of appeal until December 18, 2002, more than two months after the expiration of Tenn. R. App. P. 4(a)'s thirty-day deadline for filing a notice of appeal. The Lees did, however, file a "petition to rehear" on October 1, 2002. Thus, the pivotal jurisdictional question is whether the Lees' "petition to rehear" tolled the running of the time for filing their notice of appeal. If it did, the Lees' notice of appeal, filed two days after the entry of the order denying their "petition to rehear," is timely. If it did not, the Lees' notice of appeal is not timely, and this court lacks jurisdiction to consider the issues the Lees desire to raise on this appeal.

Tenn. R. App. P. 4(a) requires appealing parties to file their notice of appeal within thirty days after the entry of the judgment being appealed. This deadline may be extended by filing certain post-judgment motions. However, not every post-judgment motion will have the effect of extending the deadline for filing a notice of appeal. *See, e.g.*, *Daugherty v. Lumbermen's Underwriting Alliance*, 798 S.W.2d 754, 757-58 (Tenn. 1990). Only the filing of one or more of the post-judgment motions specifically listed in Tenn. R. App. P. 4(b) and Tenn. R. Civ. P. 59.01 will toll the running of the time for filing a notice of appeal in a civil case. The four post-judgment motions specified in Tenn. R. App. P. 4(b) and Tenn. R. Civ. P. 59.01 are as follows: (1) a motion under Tenn. R. Civ. P. 50.02 for judgment in accordance with a motion for a directed verdict; (2) a motion under Tenn. R. Civ. P. 52.02 to amend or make additional findings of fact; (3) a motion under Tenn. R. Civ. P. 59.02 for a new trial; and (4) a motion under Tenn. R. Civ. P. 59.04 to alter or amend the judgment.

Under the current rules of practice, filing a post-judgment "motion to rehear" in the trial court may easily amount to a fatal, self-inflicted appellate wound. Motions to rehear have not existed for over thirty-three years. *Mash v. Mash*, No. 88-165-II, 1989 WL 22704, at *2 (Tenn. Ct. App. Mar. 15, 1989) (No Tenn. R. App. P. 11 application filed); 4 NANCY FRASS MACLEAN ET AL., TENNESSEE PRACTICE § 59:9, at 344 (3d ed. 2000).[5] Thus, they are not one of the post-judgment motions specifically listed in Tenn. R. App. P. 4(b) and Tenn. R. Civ. P. 59.01 that have the effect of extending the time for filing a notice of appeal. However, too many lawyers continue to file post-judgment "motions to rehear," "petitions for reconsideration," or "petitions to rehear" and then attempt to rely on the motion or petition to extend the time for filing their notice of appeal.

When a lawyer files a post-judgment motion called a "petition to rehear" or some other name not clearly referenced in Tenn. R. App. P. 4(b) or Tenn. R. Civ. P. 59.01, the appellate courts must parse through the body of the petition or motion to determine whether it requests the sort of relief available through one of the four motions specifically listed in Tenn. R. App. P. 4(b) or Tenn. R. Civ. P. 59.01. *Tennessee Farmers Mut. Ins. Co. v. Farmer*, 970 S.W.2d 453, 455 (Tenn. 1998); *In re Estate of McCord*, No. 85-271-II, 1986 WL 2014, at *3 (Tenn. Ct. App. Feb. 13, 1986) (No Tenn.

[5]Similarly, the Tennessee Court of Criminal Appeals has repeatedly pointed out that there is no provision in the Tennessee Rules of Criminal Procedure for a "petition to reconsider" or a "petition to rehear." *State v. Lock*, 839 S.W.2d 436, 440 (Tenn. Crim. App. 1992); *State v. Ryan*, 756 S.W.2d 284, 285 n.2 (Tenn. Crim. App. 1988); *Reddick v. State*, No. E2003-00578-CCA-R3-PC, 2004 WL 572347, at *2 (Tenn. Crim. App. Mar. 23, 2004), *perm. app. denied* (Tenn. Sept. 7, 2004).

R. App. P. 11 application filed). If the relief requested in the petition or motion is not the sort of relief that may be sought by one or more of the four motions specifically listed in Tenn. R. App. P. 4(b) or Tenn. R. Civ. P. 59.01, then the motion will not be considered to be one that tolls the running of the time for filing a notice of appeal.

The Federal Rules of Civil Procedure, like the Tennessee Rules of Civil Procedure, do not recognize a motion or petition for reconsideration. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 59.30[7] (3d ed. 1997) ("MOORE'S FEDERAL PRACTICE"). However, when a motion or petition for reconsideration is filed within ten days following the entry of the judgment,[6] the federal courts will treat it as a Rule 59(e) motion to alter or amend as long as it is requesting a substantive alteration of the judgment, not merely the correction of a clerical error or relief of a type wholly collateral to the judgment itself. 12 MOORE'S FEDERAL PRACTICE § 59.30[2][b]; 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2810.1, at 121 (2d ed. 1995) ("FEDERAL PRACTICE AND PROCEDURE"). When it is debatable whether the motion should be characterized as substantive or not, it should be characterized as substantive. *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1065 (7th Cir. 1992).

Neither the federal nor the state version of Rule 59 lists specific grounds for a motion to alter or amend. Accordingly, trial courts have considerable discretion in granting or denying the motion. As a general matter, there are four basic grounds upon which a motion to alter or amend may be granted. First, the moving party may demonstrate that it is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted to permit the moving party to present newly discovered or previously unavailable evidence. Third, the motion may be justified by an intervening change in the controlling law. Fourth, the motion may be granted when necessary to prevent a manifest injustice. 11 FEDERAL PRACTICE AND PROCEDURE § 2810.1, at 124-27; 12 MOORE'S FEDERAL PRACTICE § 59.30[5][a].

The Lees' "petition to rehear" is inartfully drafted. It argues that the trial court should rehear the Tenn. R. Civ. P. 12.02(6) motions because "the Court has ruled that the Complaint did not state a cause of action" and "no opportunity has been given the plaintiffs to amend their Complaint so that the same can state a cause of action." However, the record shows that the Lees never requested permission to file an amended complaint prior to the entry of the September 12, 2002 judgment. Accordingly, the Lees, giving their petition the most charitable reading possible, appear to be arguing that the trial court was required to offer them an opportunity to amend their complaint before dismissing it for failure to state a claim upon which relief could be granted.

We are not called upon at this stage of the discussion to address the merits of the Lees' somewhat counterintuitive claim.[7] The task at hand is to determine whether the Lees' "petition to rehear" was filed within the time required by Tenn. R. Civ. P. 59.04 and whether the motion requests

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[6]In federal courts, motions to alter or amend must be filed within ten days after the entry of the judgment. Fed. R. Civ. P. 59(e). In Tennessee's courts, all Rule 59 motions, including motions to alter or amend, must be filed within thirty days after the entry of the judgment. Tenn. R. Civ. P. 59.02, 59.04

[7]We will address this issue later in the opinion.

a substantive alteration of the judgment. The Lees filed their motion within thirty days following the entry of the September 12, 2002 judgment, and they appear to be requesting that the judgment be vacated because the trial court committed a manifest error of law by dismissing their complaint for failing to state a claim without inviting them to amend it. Accordingly, we will treat the Lees' "petition to rehear" as a Tenn. R. Civ. P. 59.04 motion to alter or amend.[8] Because the Lees' petition was timely filed, it had the effect of extending the deadline for filing their notice of appeal. The Lees' notice of appeal, filed two days after the entry of the order denying their "petition to rehear," was, therefore, timely filed.

III.
THE LEES' REQUEST FOR A CONTINUANCE

The Lees assert that the trial court erred by denying their motion to continue the August 23, 2002 hearing to enable them to gather and present evidentiary materials in opposition to the evidentiary materials the defendants filed in support of their Tenn. R. Civ. P. 12.02(6) motions. They insist that the filing of the defendants' evidentiary materials converted their motions to motions for summary judgment and, therefore, that they should have been afforded a reasonable opportunity to present all material made pertinent by Tenn. R. Civ. P. 56. We have determined that the Lees were not entitled to a continuance because the trial court did not rely on the evidentiary materials submitted by the defendants and, therefore, their Tenn. R. Civ. P. 12.02(6) motions were not converted to summary judgment motions.

Motions to dismiss pursuant to Tenn. R. Civ. P. 12.02(6) challenge the legal sufficiency of the complaint. *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 406 (Tenn. 2002). They require the court to focus solely on the complaint, *Mitchell v. Campbell*, 88 S.W.3d 561, 564 (Tenn. Ct. App. 2002), and to determine, without consideration of any evidentiary materials beyond the complaint itself, whether the complaint fails to state a claim upon which relief can be granted. *Brick Church Transmission, Inc. v. Southern Pilot Ins. Co.*, 140 S.W.3d 324, 328 (Tenn. Ct. App. 2003).

Prior to the adoption of the Tennessee Rules of Civil Procedure, reliance on extraneous evidentiary materials to support a demurrer, the common-law predecessor to a Tenn. R. Civ. P. 12.02(6) motion to dismiss, was fatal.[9] However, the rules now permit a party filing a Tenn. R. Civ.

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[8]We would not have reached the same result had the Lees' "petition to rehear" simply sought permission to amend their complaint without alleging error on the part of the trial court. *See Berg v. Allied Sec., Inc.*, 737 N.E.2d 160, 161-62 (Ill. 2000) (holding that post-judgment motion for leave to file a second amended complaint was not a motion directed at the underlying judgment and therefore did not extend the deadline for filing a notice of appeal); *Morris v. Merchants Nat'l Bank of Mobile*, 359 So. 2d 371, 373-74 (Ala. 1978) (holding that post-judgment motion seeking permission to file amended complaint was not designed to have the trial court reconsider the evidence on which the judgment was based, was therefore not a proper motion to alter or amend the judgment, and did not extend the time for filing a notice of appeal).

[9]Demurrers could not "speak." *Gore v. Tennessee Dep't of Corr.*, 132 S.W.3d 369, 374 (Tenn. Ct. App. 2003). As the Tennessee Supreme Court noted, "A demurrer cannot, therefore, state what does not appear from the face of the (continued...)

P. 12.02(6) motion to dismiss to present materials outside the pleadings to support its motion. If these evidentiary materials are not excluded by the trial court, the Tenn. R. Civ. P. 12.02(6) motion is converted to a motion for summary judgment, and, according to Tenn. R. Civ. P. 12.02, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The conversion provision in Tenn. R. Civ. P. 12.02 applies only to Tenn. R. Civ. P. 12.02(6) motions[10] and is not triggered when the parties attach exhibits to their pleadings.[11] Trial courts have broad discretion to accept or to exclude evidentiary materials submitted in support of a Tenn. R. Civ. P. 12.02(6) motion. *Pacific E. Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 952 (Tenn. Ct. App. 1995). If they do not exclude the proffered materials, they must treat the motion as one for summary judgment. If, however, they do not consider the materials, no conversion occurs, and the motion remains a Tenn. R. Civ. P. 12.02(6) motion. 5A FEDERAL PRACTICE AND PROCEDURE § 1366, at 491. While trial courts should state explicitly whether they are excluding or considering the additional evidentiary materials,[12] their failure to do so does not require us to reverse their decision either to accept or to exclude the evidentiary materials. *Asbury v. Lagonia-Sherman, LLC*, No. W2001-01821-COA-R3-CV, 2002 WL 31306691, at *3 (Tenn. Ct. App. Oct. 15, 2002), *perm. app. denied* (Tenn. Feb. 24, 2003); *Teaster v. Tennessee Dep't of Corr.*, 1998 WL 195963, at *4.

The Lees would have been entitled to a continuance of the August 23, 2002 hearing under Tenn. R. Civ. P. 12.02 only if the trial court accepted and relied upon the evidentiary materials the defendants submitted in support of their motions to dismiss. The trial court and the parties specifically discussed this matter at the August 23, 2002 hearing. Notwithstanding the fact that it was the defendants who had submitted the materials, they repeatedly stated that they would prefer the trial court to exclude the materials and to decide their motions based on the adequacy of the complaint's allegations. At the conclusion of the hearing, the trial court stated that "[a]ccordingly, it is the opinion of the Court that the complaint fails to state a claim upon which relief can be granted." As we construe the trial court's decision, it did not rely on the evidentiary materials, and

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[9](...continued)
bill, otherwise it would be what has been emphatically called a speaking demurrer, that is, a demurrer wherein a new fact is introduced in order to support it." *Allpress v. Lawyers Title Ins. Corp.*, 218 Tenn. 673, 677, 405 S.W.2d 572, 573 (1966).

[10]*See, e.g.*, *Chenault v. Walker*, 36 S.W.3d 45, 55 (Tenn. 2001) (declining to convert a Tenn. R. Civ. P. 12.02(1) motion).

[11]*Ivy v. Tennessee Dep't of Corr.*, No. M2001-01219-COA-R3-CV, 2003 WL 22383613, at *3 (Tenn. Ct. App. Oct. 20, 2003) (No Tenn. R. App. P. 11 application filed).

[12]*Teaster v. Tennessee Dep't of Corr.*, No. 01A01-9608-CH-00358, 1998 WL 195963, at *3 (Tenn. Ct. App. Apr. 24, 1998) (No Tenn. R. App. P. 11 application filed); *see also Demmert v. Kootznoowoo, Inc.*, 960 P.2d 606, 609 (Alaska 1998); *McCauley v. Suls*, 716 A.2d 1129, 1132 (Md. Ct. Spec. App. 1998).

thus the Lees were not entitled to a continuance because the Tenn. R. Civ. P. 12.02(6) motions were never converted to summary judgment motions.[13]

IV.
THE ADEQUACY OF THE LEES' TORTIOUS INTERFERENCE WITH CONTRACT CLAIM

The Lees' principal issue on appeal involves the dismissal of their complaint for failure to state a claim upon which relief can be granted against Mr. McDonald and McDonald, Levy & Taylor.[14] They assert that the trial court erred by concluding that their complaint failed to allege facts showing that their contract with the Shoughrues was actually breached. Like the trial court, we have concluded that the Lees' complaint fails to state a claim upon which relief can be granted.

A.

The sole purpose of a Tenn. R. Civ. P. 12.02(6) motion is to test the sufficiency of the complaint, not the strength of the plaintiff's evidence. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *City of Brentwood v. Metropolitan Bd. of Zoning Appeals*, 149 S.W.3d 49, 53-54 (Tenn. Ct. App. 2004). It requires the courts to review the complaint alone, *Daniel v. Hardin County Gen. Hosp.*, 971 S.W.2d 21, 23 (Tenn. Ct. App. 1997), and to look to the complaint's substance rather than its form. *Kaylor v. Bradley*, 912 S.W.2d 728, 731 (Tenn. Ct. App. 1995). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief or when the complaint is totally lacking in clarity and specificity. *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).

A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Winchester v. Little*, 996 S.W.2d 818, 821-22 (Tenn. Ct. App. 1998); *Smith v. First Union Nat'l Bank of Tenn.*, 958 S.W.2d 113, 115 (Tenn. Ct. App. 1997). Accordingly, courts reviewing a complaint being tested by a Tenn. R. Civ. P. 12.02(6) motion must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, *Stein v. Davidson Hotel*, 945 S.W.2d 714, 716 (Tenn. 1997), and by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts. *Leach v. Taylor*, 124 S.W.3d 87, 92 (Tenn. 2004); ROBERT BANKS, JR. & JUNE F. ENTMAN, TENNESSEE CIVIL PROCEDURE § 5-6(g), at 5-110 (2d ed. 2004). On appeal from an order granting a Tenn. R. Civ. P. 12.02(6) motion, we must likewise presume that the factual allegations in the complaint are true, and we must review the trial court's legal conclusions regarding

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[13]The Lees also assert for the first time on appeal that the trial court erred by refusing to grant a continuance because they needed time to find a substitute lawyer to represent them in this matter. They have waived this argument because they did not raise it in the trial court. *Taylor v. Beard*, 104 S.W.3d 507, 511 (Tenn. 2003); *Caldwell v. Canada Trace, Inc.*, No. W2003-00264-COA-R3-CV, 2004 WL 1459418, at *4 (Tenn. Ct. App. June 28, 2004), *perm. app. denied* (Tenn. Dec. 6, 2004).

[14]The Lees have not taken issue on appeal with the trial court's determination that their original complaint against Mr. McDonald and McDonald, Levy & Taylor failed to state a claim upon which relief can be granted on any theory other than tortious interference with contract.

the adequacy of the complaint without a presumption of correctness. *Conley v. State*, 141 S.W.3d 591, 594-95 (Tenn. 2004); *Stein v. Davidson Hotel*, 945 S.W.2d at 716.

B.

Tennessee law permits recovery for tortious interference with the performance of a contract only if the injured party proves (1) that there was a legal contract; (2) that the defendant knew of the existence of the contract; (3) that the defendant intended to induce a breach of the contract; (4) that the defendant acted maliciously; (5) that the contract was actually breached; (6) that the defendant's acts were the proximate cause of the breach; and (7) that the plaintiff suffered damages resulting from the breach. *Buddy Lee Attractions, Inc. v. William Morris Agency, Inc.*, 13 S.W.3d 343, 359 (Tenn. Ct. App. 1999); *Dynamic Motel Mgmt., Inc. v. Erwin*, 528 S.W.2d 819, 822 (Tenn. Ct. App. 1975). A complaint for tortious interference with contract must do more than simply parrot the legal elements of the cause of action. As we recently stated, "Tenn. R. Civ. P. 8.01 still requires that the facts upon which a claim for relief is founded must be stated in the complaint." *Miller v. Ellison*, No. E2003-02732-COA-R3-CV, 2004 WL 1467441, *2 (Tenn. Ct. App. June 30, 2004) (No Tenn. R. App. P. 11 application filed). Thus, a complaint alleging tortious interference with the performance of a contract must also allege specific facts that, if true, would support each of the seven elements of the tort.

The trial court held that the Lees' original complaint failed to allege facts supporting the fifth element of tortious interference with their contract with the Shoughrues, i.e., that the contract was actually breached. Having reviewed the Lees' complaint in detail, we agree with the trial court's conclusion. The complaint is devoid of any specific allegations regarding statements or conduct by Mr. Shoughrue, Ms. Shoughrue, Devin, or anyone acting on their behalf which, if true, would show that they breached their contract with the Lees. Given the total absence of such allegations, the trial court was correct to find that the Lees' complaint failed to state a claim upon which relief could be granted against Mr. McDonald and McDonald, Levy & Taylor for tortious interference with contract.

However, even if the Lees' original complaint could be construed as alleging a breach of contract on the part of the Shoughrues, the trial court could still have properly dismissed the complaint because it fails to allege sufficient facts to sustain the sixth element of a tortious interference with contract claim, i.e., that the defendants' acts were the proximate cause of the breach of contract. In the complaint, the Lees alleged that Mr. McDonald and his law firm agreed to represent Ms. Baker, that they intervened in the malpractice suit on Ms. Baker's behalf, and that they agreed to a proposed settlement of the malpractice claims of Devin and Ms. Shoughrue's estate that required court approval to become effective. It is difficult to imagine how such conduct, standing alone, could be the proximate cause of a decision by the Shoughrues to breach their attorney-client contract with the Lees.

The original complaint contains no other factual allegations regarding the conduct of Mr. McDonald and his law firm that would tend to establish any sort of causal connection between their conduct and the conduct of the Shoughrue family. Thus, because the complaint also failed to allege facts showing that the actions of Mr. McDonald and his law firm were the proximate cause of the Shoughrues' putative breach of their contract with the Lees, the trial court's decision to dismiss the

complaint for failure to state a claim upon which relief could be granted was correct. Accordingly, we affirm the trial court's September 12, 2002 judgment dismissing the Lees' original complaint under Tenn. R. Civ. P. 12.02(6).

V.
THE LEES' "PETITION TO REHEAR"

The Lees' final argument is that the trial court erred by denying their "petition to rehear" and by refusing to permit them to amend their complaint after granting the defendants' Tenn. R. Civ. P. 12.02(6) motion to dismiss. They assert that the trial court was required to afford them an opportunity to amend their complaint before dismissing it. Even though the trial court addressed the Lees' request to amend their complaint without first addressing whether they had grounds to set aside the judgment, we have determined that the trial court reached the correct result.[15]

Tennessee law and policy have always favored permitting litigants to amend their pleadings to enable disputes to be resolved on their merits rather than on legal technicalities. *Karash v. Pigott*, 530 S.W.2d 775, 777 (Tenn. 1975); *Patton v. Dixon*, 105 Tenn. 97, 103, 58 S.W. 299, 301 (1900); *Rutherford v. Rains*, 3A Tenn. (2 Cooke) 35, 42 (1814). This policy is reflected in Tenn. R. Civ. P. 15.01's admonition that "leave [to amend a pleading] shall be freely given when justice so requires." However, once a judgment dismissing a case has been entered, the plaintiff cannot seek to amend its complaint without first convincing the trial court to set aside its dismissal pursuant to Tenn. R. Civ. P. 59 or 60. *Carson v. DaimlerChrysler Corp.*, No. W2001-03088-COA-R3-CV, 2003 WL 1618076, at *5 (Tenn. Ct. App. Mar. 19, 2003) (No Tenn. R. App. P. 11 application filed); *Isbell v. Travis Elec. Co.*, No. M1999-00052-COA-R3-CV, 2000 WL 1817252, at *11 & n.5 (Tenn. Ct. App. Dec. 13, 2000) (No Tenn. R. App. P. 11 application filed); 6 FEDERAL PRACTICE AND PROCEDURE § 1489, at 692-94.

The Lees' "petition to rehear" actually requested two types of relief. First, it requested the trial court to set aside its judgment dismissing their complaint for failure to state a claim upon which relief could be granted. Second, it requested permission to amend the Lees' original complaint. These requests are analytically distinct, and the trial court should have considered the Lees' request to set aside the judgment before addressing their request to amend their complaint. Thus, we will first consider the Lees' request to set aside the judgment of dismissal.

We have already determined in Section II that the Lees' petition to rehear was essentially a Tenn. R. Civ. P. 59.04 motion to alter or amend. The Lees asserted that the trial court erred by dismissing their complaint without first inviting them, sua sponte, to file an amended complaint.

[15]The Court of Appeals may affirm a judgment on different grounds than those relied on by the trial court when the trial court reached the correct result. *Continental Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 789 (Tenn. Ct. App. 1999); *Allen v. National Bank of Newport*, 839 S.W.2d 763, 765 (Tenn. Ct. App. 1992); *Clark v. Metropolitan Gov't of Nashville & Davidson County*, 827 S.W.2d 312, 317 (Tenn. Ct. App. 1991).

While this argument appears to have gained acceptance by two federal appellate courts,[16] the vast majority of federal appellate courts have rejected it.[17]

The federal courts' interpretations of Federal Rules of Civil Procedure are not binding on us in our interpretation of the Tennessee Rules of Civil Procedure. *Harris v. Chern*, 33 S.W.3d 741, 745 n.2 (Tenn. 2000); *State v. Caughron*, 855 S.W.2d 526, 553 (Tenn. 1993). However, federal case law interpreting the federal rules may serve as persuasive authority when we are interpreting state rules that are similar to federal ones. *Frazier v. East Tenn. Baptist Hosp., Inc.*, 55 S.W.3d 925, 928 (Tenn. 2001); *Harris v. Chern*, 33 S.W.3d at 745 n.2. This is such a case.

Consistent with the prevailing view among the federal appellate courts, we decline to interpret Tenn. R. Civ. P. 15.01 to require trial courts to invite plaintiffs to amend their complaint before granting a Tenn. R. Civ. P. 12.02(6) motion. Such a rule would cause great trouble, delay, and expense for defendants and the courts, give plaintiffs an unfair procedural advantage, and remove any incentive for plaintiffs to be proactive in amending defective complaints in the face of meritorious Tenn. R. Civ. P. 12.02(6) motions to dismiss. *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d at 543. Accordingly, the trial court should have rejected this argument as a basis for reopening the September 12, 2002 judgment under Tenn. R. Civ. P. 59.04. Had the trial court followed this course of action, its discussion of whether the Lees' proposed amended complaint should be allowed under the liberal amendment policy of Tenn. R. Civ. P. 15.01 would have been unnecessary.[18]

VI.
DAMAGES FOR FRIVOLOUS APPEAL PURSUANT TO TENN. CODE ANN. § 27-1-122 (2000)

As a final matter, Mr. McDonald and McDonald, Levy & Taylor argue that we should find the Lees' appeal to be frivolous and award them attorneys' fees and costs in accordance with Tenn. Code Ann. § 27-1-122. They assert that the Lees pursued this appeal "in an effort to punish [them] economically." Our review of the record supports their conclusion.

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[16] *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

[17] *Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249 (2d Cir. 2004) (*per curiam*); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 241-42 (1st Cir. 2004); *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (*en banc*); *Cleveland v. Rotman*, 297 F.3d 569, 575 (7th Cir. 2002); *Calderon v. Kansas Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1187 (10th Cir. 1999); *Guam v. American President Lines*, 28 F.3d 142, 150-51 (D.C. Cir. 1994); *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994); *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1068 n.1 (4th Cir. 1993); *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1041-42 (6th Cir. 1991).

[18] In saying this, we do not intend to imply that we disagree with the trial court's conclusion that the proposed amended complaint, like the Lees' original complaint, failed to state a claim upon which relief could be granted. To the contrary, were we to address this question, we would conclude, as the trial court did, that the proposed amended complaint also failed to state a claim upon which relief could be granted for tortious interference with business relations. In their brief on appeal, the Lees did not contest the trial court's finding that the proposed amended complaint failed to state causes of action for breach of contract and unjust enrichment.

Parties should not be forced to bear the cost and vexation of baseless appeals. *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977); *Young v. Barrow*, 130 S.W.3d 59, 66 (Tenn. Ct. App. 2003). Accordingly, in 1975, the General Assembly enacted Tenn. Code Ann. § 27-1-122 to enable appellate courts to award damages against parties whose appeals are frivolous or are brought solely for the purpose of delay. A frivolous appeal is an appeal that is so devoid of merit that it has no reasonable chance of succeeding. *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978); *Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn. Ct. App. 2001); *Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999); *Industrial Dev. Bd. of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995). Determining whether to award these damages is a discretionary decision. *Banks v. St. Francis Hosp.*, 697 S.W.2d 340, 343 (Tenn. 1985).

The Lees' claim for damages in this case is based solely on their belief that the conduct of Mr. McDonald and the other lawyers involved in the Shoughrues' medical malpractice case caused them to receive a smaller fee than they might otherwise have received. This inherently speculative claim was undermined by the decisions by the trial court and this court in the medical malpractice case that the Lees had been fairly compensated for the work they performed. *Shoughrue v. St. Mary's Med. Ctr., Inc.*, 2004 WL 948381, at *14. It was also undermined by the absence of any factual allegations in the complaint that the Lees' clients breached their contract with the Lees. Accordingly, we have concluded that the Lees' appeal had little chance of success and, therefore, that it was frivolous. On remand, we instruct the trial court to enter a judgment for Mr. McDonald and his law firm and against the Lees for the attorneys' fees and costs they incurred in defending this appeal.

VII.

We affirm the judgment dismissing the Lees' complaint and the order denying the Lees' "petition to rehear." We remand the case to the trial court for further proceedings consistent with this opinion, including an award of attorneys' fees and costs to Mr. McDonald and McDonald, Levy & Taylor in accordance with Tenn. Code Ann. § 27-1-122. We also tax the costs of this appeal to J. D. Lee, David C. Lee, the law firm of Lee, Lee & Lee, jointly and severally, and their surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.